No. 185

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JUL 17 1953
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Supreme Court of the United States

OCTOBER TERM 1952.

LORETTA ELIZABETH O'LOUGHLIN,
Petitioner,

vs.

THOMAS A. O'LOUGHLIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,
Counsel for Petitioner.

July 13, 1953.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Loretta Elizabeth O'Loughlin, respectfully prays for the issuance of a Writ of Certiorari to review the final judgment of the Supreme Court of New Jersey entered April 27, 1953.

Opinions Below.

Printed in the record (R. 347) is the opinion of the Supreme Court of New Jersey which is directly attacked on this application. It is officially reported at 12 N. J. 22 (April 27, 1953).

Printed in the record (R. 109) is the opinion of the Superior Court of New Jersey, Chancery Division, Essex County (the Court of first instance). It is not officially or unofficially reported.

Printed in the record (R. 13) is the earlier opinion of the Supreme Court of New Jersey upon a preliminary phase of the case. It is officially reported in 6 N. J. 170 (1951).

Attached hereto as Appendix "A" is the "Check List" of the manner in which the individual Justices of the Supreme Court of New Jersey voted on the decision now under direct attack.

Basis of Jurisdiction.

1. The jurisdiction of this Court to issue the writ of certiorari herein prayed for is conferred by Title 28 United States Code, Sections 1257 (3) and 2101 (c).

2. There is involved in this case a denial by New Jersey of the constitutional command that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other state. * * *" (Art. IV, Sec. 1 of the Federal Constitution), as implemented by Title 28 United States Code Section 1738, which provides among other things:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the Courts of such State, Territory or Possession from which they are taken."

3. The date of the judgment sought to be reviewed is April 27, 1953. That is the date of the filing of the decision of the Supreme Court of New Jersey.

The within application is made within 90 days of the entry of such judgment.

4. The questions involved are substantial because:

(a) as Mr. Justice Jackson said in *Barber* v. *Barber*, 323 U. S. 77, 88 (1944): "The purpose of the full faith and credit clause is to lengthen the arm of the state court and to eliminate state lines as a shelter from judicial proceedings."

(b) in the gamut of Federal questions that arise from state court proceedings, none is more important —and none has been recognized more frequently in this Court—than the denial of full faith and credit to final judgments of each state, one to the other;

(c) the assertion by New Jersey of a *non-federal* ground as a pretext to evade deciding a substantial federal question relating to final judgments (divorce or otherwise), is a matter that this Court ought to seize upon and repudiate. Any other policy would result in a gradual whittling away of the "Full Faith and Credit Clause" of our Federal Constitution.

5. The Federal question was recognized in the Court below as is evident by the following excerpts which appear in the majority opinion of the Supreme Court of New Jersey:

> "The appellant contends that the Nevada judgment entered in 1935 is entitled to full faith and credit in this State and that a judgment for the arrears and interest should have been entered thereunder. The argument is that the 1935 judgment is a final judgment as to all arrearages and is entitled to full faith and credit and that under the law of Nevada the court is without power to retroactively modify accrued arrearages under that judgment" (R. 349).
>
> • • • • • •
>
> "Under the Federal Constitution and the decided cases our courts are only required to give full faith

and credit to a judgment of a foreign state with respect to alimony where the past due installments are irrevocable, absolute and vested under the law of the state in which the judgment was entered. Barber *v.* Barber, 21 Howard 582, 166 Ed. 226 (1852); Sistare *v.* Sistare 218 U. S. 1, 54 L. Ed. 1905, 30 Sup. Ct. 681 (1910); * * *" (R. 349).

6. The Federal question was passed upon by the Court below as follows:

(a) the majority decided that the Nevada judgment was not final as to past due installments of alimony; that past due installments of alimony under the Nevada decree did not vest as they accrued thereunder; that under Nevada law it was within the competence of the parties *orally to modify the April 1935 Nevada judgment* (R. 351-2).

(b) the majority held that the award of alimony to petitioner in Nevada offended local New Jersey policy which denies alimony to a "guilty spouse." Consequently, the New Jersey court denied an upward modification of alimony ordinarily available under New Jersey statutes because of changed circumstances.

7. The following decisions sustain the jurisdiction of the Supreme Court to review final judgments of state courts of last resort for the asserted denial of full faith and credit to sister-state final judgments:

Sistare v. *Sistare,* 218 U. S. 1 (1910);
Barber v. *Barber,* 323 U. S. 77 (1944);
Scherrer v. *Scherrer,* 334 U. S. 343 (1948);
Coe v. *Coe,* 334 U. S. 378 (1948);
Cook v. *Cook,* 342 U. S. 126 (1951);
Williams v. *North Carolina,* 317 U. S. 387 (1942);
Williams v. *North Carolina,* 325 U. S. 226 (1945);
Estin v. *Estin,* 334 U. S. 541 (1948);

Krieger v. *Krieger*, 334 U. S. 555 (1948);
Griffin v. *Griffin*, 327 U. S. 220 (1946);
Halvey v. *Halvey*, 330 U. S. 610 (1947);
Johnson v. *Muelberger*, 340 U. S. 581 (1951).

Questions Presented.

1. Did the refusal by New Jersey to enter judgment for arrearages of past due alimony accrued under a Nevada final judgment of divorce amount to a denial of the full faith and credit to which the Nevada judgment is entitled under Article IV, Sec. 1 of the Federal Constitution?

2. Since the Nevada judgment specifically reserved to the Court all modifications, was it not a denial of "Full Faith and Credit" when New Jersey based its judgment upon an alleged oral modification?

3. If under the Nevada judgment a "guilty spouse" is entitled to alimony and an upward modification, did not the application by New Jersey of its local policy in conflict therewith, amount to a denial of "Full Faith and Credit?"

Statutes Involved.

Attached hereto as Appendix "B" is the New Jersey Statute (N. J. S. 2:50-37; now 2A:34-23) under which petitioner sued for an upward modification of the alimony payable under the Nevada judgment because of changed circumstances.

Attached hereto as Appendix "C" are Sections 9463 and 9465 which appear in the 1929 Compiled Statutes of

Nevada and which are referred to in the opinion of the Supreme Court of New Jersey (R. 350).

Attached hereto as Appendix "D" is Section 9474.01 of the Nevada Compiled Statutes Supp. 1943-49, approved March 17, 1949.

Summary Statement of the Matter Involved.

(Emphasis supplied unless otherwise noted)

The question in this case is the denial by New Jersey of full faith and credit to a final decree of divorce entered April 26, 1935 in Nevada in an action in which the Nevada Court had jurisdiction over both parties and of the subject matter of the litigation (R. 63).

The Nevada final decree (April 25, 1935) approved and ratified an agreement dated April 22, 1935 which (for present purposes) provided principally that:

(a) the husband (respondent here) was to pay the wife $225.00 per month as long as she lived or until she remarried (R. 185);

(b) the wife was to maintain and educate the son until he became 21 years of age, and if she remarried and had custody of the son, she was to receive $100.00 per month until the son became 21 years of age (R. 189).

The Nevada Court specifically reserved

> "jurisdiction over all questions of alimony, child support, custody of the minor, and right of visitation of minor * * * and that the same may upon proper application being hereinafter made therefor by either party hereto be subject to such modification *by this Court* as the circumstances and facts at that *future* time presented may deduce" (R. 65).

Petitioner never remarried, but defendant remarried within three months thereafter. Neither party ever applied to the Nevada Court (or to any other Court—except the Court below) for the relief which Nevada reserved to itself in the foregoing quoted portion of the final decree, *and the final decree in Nevada today stands unreversed and unmodified of record* (R. 63 to 65).

The Superior Court of New Jersey (having complete jurisdiction over both parties) and, on appeal, the Supreme Court of New Jersey (the court of last resort) determined that an *oral* modification of the Nevada *final decree* had been made by the parties in *October 1935* (six months after the date of entry) reducing the alimony from $225.00 to $125.00 per month. The consideration for the change was alleged to be the assumption of custody of the child by the father (R. 109 and 347).

The issues at the trial under the amended complaint were:

(a) the arrearages of past due installments of over $16,000.00 accruing under the Nevada decree at the rate of $100.00 per month from 1942 (when the son attained his majority);

(b) an upward modification of alimony prospectively under the New Jersey Statutes in view of changed circumstances, to wit:

(1) the depressed dollar value since 1935;

(2) petitioner's increased needs;

(3) respondent's improved financial position;

(4) the 1942 Federal Income Tax Amendment making alimony payable pursuant to a judgment taxable to the wife and deductible by the husband (R. 19 and 348).

The trial court dismissed petitioner's count for arrearages for past due installments of alimony on the ground of the alleged *oral* modification of the Nevada judgment (R. 119).

With respect to the count for upward modification, however, the trial court concluded that petitioner's claim was justified, and upon the assumption that the purchasing power of the 1935 dollar was worth only fifty cents in 1952, the trial judge doubled the prospective alimony to $250.00 per month from $125.00 per month—the reduced amount that respondent had been paying since October 1935 (R. 121).

The Supreme Court of New Jersey, on appeal and cross-appeal, *divided three ways* in their decision upon the issue of "full faith and credit" (Appendix "A"):

> 1. Five Justices constituting the majority decided (a) that the Nevada judgment did not possess the attributes of finality which required New Jersey to give full faith and credit to it to the extent of awarding judgment for the arrearages for past due installments of alimony; (b) that the allowance of alimony by the Nevada Court to petitioner, who was the defendant in the Nevada proceeding, was in conflict with New Jersey's public policy of denying alimony to wives against whom judgments of divorce are rendered, and that consequently, full faith and credit to the Nevada judgment of alimony could not be relied upon as a basis for an upward modification of the alimony under the New Jersey Statute by virtue of changed circumstances (R. 354).
>
> 2. One Justice (Heher, J.) dissented in part, and filed a dissenting opinion. He held that the Nevada judgment incorporating the support agreement was entitled to full faith and credit, that there was no enforceable modification and that judgment for the full

arrears should have been awarded to petitioner less an allowance to respondent for the period that he supported the child before he attained his majority (which was what petitioner claimed—R. 355).

3. The Chief Justice (Vanderbilt C. J.) voted to affirm the Superior Court. In effect, he agreed with the majority but differed with Justice Heher with respect to the arrearage count. He voted to affirm the upward modification count (thereby differing with the majority), and, in effect, held that the alimony judgment of Nevada was entitled to full faith and credit in New Jersey as a basis for increasing the alimony because of changed circumstances.

The basic issue, therefore, is whether New Jersey has given to the Nevada judgment the full faith and credit that is due it under the Federal Constitution.

Reasons for Granting the Writ.

SUMMARY.

1. The decision of the Court below is in direct conflict with decisions of this Court—especially *Sistare* v. *Sistare*, 218 U. S. 1 (1910) and the cases following and approving it.

2. Clearly, the question of "full faith and credit"—particularly with respect to the collection of past due installments under alimony judgments—is of paramount importance in the Federal system.

3. The decision of the Court below is erroneous because it incorrectly interpreted Nevada law with respect to Nevada final judgments, and incorrectly applied New Jersey's local policy, in derogation of "full faith and credit".

1.

The decision of the Court below is in direct conflict with decisions of this Court—especially *Sistare* v. *Sistare*, 218 U. S. 1 (1910) and the cases following and approving it.

The *Sistare* case stands for the following propositions:

(a) The general rule is that where a decree for alimony is payable in future installments, the right to such installments becomes absolute and vested upon becoming due, and that right is protected by "the Full Faith and Credit Clause", provided no legal modification of the decree has been made before the maturity of the installments.

(b) The general rule does not prevail where by the laws of the state where the alimony judgment is rendered, the court is empowered in the exercise of its discretion to modify or cancel the alimony retroactively—even tho no application to annul or modify the judgment is actually made before the installments become due.

(c) Every reasonable implication must be resorted to against the existence of power to cancel or modify past due alimony installments accrued under a judgment in the absence of clear language manifesting an intention to confer it.

The decision of the *Sistare* case has never been questioned. It remains today just as important a milestone in the long line of Federal decisions as it was when it was rendered over 40 years ago. It has constantly been cited with approval throughout the land in state court decisions as well as in this Court.

The *Sistare* case is recognized as the law of New Jersey;

Conwell v. *Conwell*, 3 N. J. 266, 69 Atl. (2) 712 (1949).

It is recognized as the law of Nevada:

Biel v. *Godwin*, 245 P(2) 997 (1952);
Summers v. *Summers*, 241 P(2) 1099 (1952).

It has been cited with approval in this Court:

Barber v. *Barber*, 323 U. S. 77 (1944).

With such a heritage, the force of *Sistare* v. *Sistare* cannot be ignored. For this reason alone, it is submitted the writ should be granted. The sanctity of this Court's decision must command continued respect—otherwise the "Full Faith and Credit Clause" like any other constitutional right can disappear by non-observance and non-enforcement.

2.

Clearly, the question of "full faith and credit"—particularly with respect to the collection of past due installments under alimony judgments—is of paramount importance in the Federal system.

According to the 1952 Britannica "Book of the Year" the number of divorces (including annulments) in the United States in 1949 was 397,000; in 1950, 385,000, and in 1951, it was estimated at 375,000. It may fairly be assumed that the figure for 1952 was in the neighborhood of 375,000 and that for 1953 and the years to follow the number of divorces in this country will be in excess of 350,000.

There is no way of knowing accurately what proportion of the divorce decrees contain provisions for the payment of alimony in installments. Again, a reasonable assumption: probably in excess of 250,000 cases, alimony is payable in installments.

In the interest of uniformity, and in the interest of those ex-spouses who hold alimony judgments payable in installments, should there not be an unequivocal pronouncement setting a pattern for the future?

Should not the holders of alimony judgments know that they can enforce the arrears thereunder not only in the state where the judgments were entered, but in every one of the other states, Territories and Possessions of the United States—in the same manner that they could in the state of entry—so that no state could create a policy to make itself "a haven for fugitive husbands"? See: Prefatory note "Reciprocal Enforcement of Support Act" 9A-U. L. A. 35, 39 (Supp.—1952).

Moreover, the denial by sister states of full faith and credit to installment alimony judgments is fraught with serious economic and social consequences. Ex-husbands, subject to alimony responsibilities, will remove from the state of the entry of judgment and set up all manner of defenses to the suits to collect arrearages elsewhere. This practice can be effectively stopped by enforcing the protection which Article IV, Sec. 1 of the Federal Constitution affords. Recognize these alimony judgments in the various states in the same manner that they are enforceable in the states of original entry and the problems of non-support will be kept to a minimum. See an interesting comment on this problem in 53 Columbia Law Review 817—June, 1953.

3.

The decision of the Court below is erroneous because it incorrectly interpreted Nevada law with respect to Nevada final judgments, and incorrectly applied New Jersey's local policy, in derogation of "full faith and credit".

A.

In Nevada, past due installments of alimony under final judgments vest as they accrue. *And a reservation of power to modify operates prospectively only and does not affect past due arrears.*

Because this particular issue has not been the subject of litigation in Nevada, there are no decisions in that jurisdiction which state the foregoing principles *haec verba.* There are, however, numerous decisions of other states declaring Nevada law to be as we have just stated it. For example, in New York and New Jersey see:

Fry v. *Fry,* 108 N. Y. Supp. (2) 227 (App. Div., 1951); aff'd 304 N. Y. 889, 110 N. E. (2) 501 (Ct. of App., 1953);

Van Horn v. *Van Horn,* 188 N. Y. Supp. 98 (App. Div., 1921);

Lichtman v. *Lichtman,* 63 N. Y. Supp. (2) 799 (Sup., 1946);

Goodrich v. *Harrison,* 9 N. J. Super. 382 (Chan., 1950);

Whitehead v. *Villapiano,* 16 N. J. Super. 415 (App. Div., 1951).

And Nevada, on the basis of *Sistare* v. *Sistare, supra,* has given such effect to California and New York alimony judgments which were being enforced in Nevada.

Biel v. *Godwin*, 245 P. (2) 997 (1952);
Summers v. *Summers*, 241 P. (2) 1099 (1952).

There can be no question but that Nevada law is as we have stated it from the fact that in 1949 the Nevada legislature, by a statute which appears as Appendix "D" hereto, relaxed the previously inexorable features of its law which vested the past due arrears of installment alimony, and nothing but payment could discharge them. Since 1949, *by a stipulation signed by both parties in the cause* the arrears may be adjusted. The 1949 statute also permits modification *prospectively* of alimony payments, whereas previously, even that could not have been done in the absence of a permissive reservation in the final decree.

What New Jersey did was to circumvent the Nevada judgment by saying that it was within the competence of the parties to modify it by oral agreement. This, we claim, to be erroneous for two reasons:

(a) the rationale of the *Sistare* decision, *supra;*

(b) by the terms of the Nevada judgment it could only be modified by judicial action at such time as a change of circumstances was brought to the attention of the Court (R. 65).

B.

New Jersey's reliance upon *Blankenship* v. *Blankenship*, 51 Nev. 356; 276 P. 9 (1929) as authority that Nevada would grant alimony to a wife only if she were the successful litigant in divorce proceedings is erroneous and is not borne out by any subsequent Nevada decisions.

Gerbig v. *Gerbig*, 60 Nev. 292 (1940); 108 P. (2) 317.

Furthermore, since 1931, and prior to the decree herein, Nevada has granted divorces on the ground that the spouses

have lived separate and apart for five years and have not cohabited—*and that, regardless of who was responsible for the separation.*

Herrick v. *Herrick*, 55 Nev. 59 (1933); 25 P. (2) 378;
George v. *George*, 56 Nev. 12 (1935); 41 P. (2) 1059;
Lemp v. *Lemp*, 62 Nev. 91 (1943); 141 P. (2) 212;
Kohlsaat v. *Kohlsaat*, 62 Nev. 485 (1945); 155 P. (2) 474.

If a wife can obtain a divorce under Nevada law, she can likewise obtain the lesser and dependent relief of alimony!

This Court is not bound by New Jersey's interpretation of what the Nevada law is on the subject. In fact this Court has said it is its duty to ascertain the law of the first state when a denial by another state of full faith and credit to the first state's judgment is asserted. *Barber* v. *Barber*, 323 U. S. 77 (1944).

It being conceded that no application was ever acted upon by Nevada or any other court for that matter (except the court below), it was clearly erroneous to refuse to give judgment for the arrears in New Jersey.

Furthermore, since local policy must give way to the "Full Faith and Credit Clause" of the Federal Constitution, it was clearly error for the New Jersey Supreme Court to say with respect to petitioner's application to have the Nevada alimony judgment serve as a basis for an upward modification of the alimony because of changed circumstances:

> "• • • The result would be no different indeed (denial of jurisdiction) if she had been awarded alimony in

> the strict sense *for such foreign action would have no bearing on New Jersey public policy as expressed in its statute.* * * *" (R. 354).

This Court has repeatedly held that local public policy must give way to the "Full Faith and Credit Clause"; in fact, to such an extent, that even if the basis of the sister state's judgment would not have been recognized in the second state as an original matter, once judgment has been entered in the first state, it must be recognized and enforced in the second state.

Williams v. *North Carolina*, 317 U. S. 387 (1942); *Johnson* v. *Muelberger*, 340 U. S. 581 (1951).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,
Counsel for Petitioner.

July 13, 1953.

Form C 148A

SUPREME COURT OF NEW JERSEY

No. A-99 September Term, 19 53

On appeal from Chancery Division, Superior Court

On certification to _____ Court

Loretta Elizabeth O'Loughlin,
Plaintiff-Appellant

and

Thomas A. O'Loughlin,
Defendant-Respondent.

Decided April 27, 19 53

The Chief Justice presiding

Opinion by Oliphant, J.

Dissenting opinion by Heher, J.

CHECK LIST	Affirm	Reverse in part	Modify	Concur in Result
The Chief Justice	1			
Mr. Justice Heher		1		
" " Oliphant			1	
" " Wachenfeld			1	
" " Burling			1	
" " Jacobs			1	
" " Brennan			1	
Totals	1	1	5	

Appendix B.

2:50-37 Alimony; custody and maintenance of children; security; failure to obey order; sequestration; receiver; modification of orders.

Pending a suit for divorce or nullity, brought in this State or elsewhere, or after judgment of divorce, whether obtained in this State or elsewhere, the court may make such order touching the alimony of the wife, and also touching the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders, and upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with the order, may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just, or enforce the performance of the said orders by such other lawful ways and means as is usual, and according to the source and practice of the court; orders so made may be revised and altered by the court from time to time as circumstances may require. As amended L. 1948, c. 320, p. 1291, §25.

Appendix C.

Nevada Compiled Laws 1929.

Sec. No. 9463: Disposition of Property, what considerations determine. Effect of Decree on Matters not specifically mentioned. Preliminary Restraining Orders.

No. 25. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of the children. And all property and pecuniary rights and interests, and all rights touching the children, their custody and guardianship, not otherwise disposed of or regulated by the order of the court, shall by such divorce, be divested out of the guilty party, and vested in the party at whose instance the divorce was granted. And if after the filing of the petition, it shall be made to appear probable to the court or the judge, in vacation, that either party is about to do any act that would defeat or render less effectual any order which the court might ultimately make concerning property or pecuniary interests, an order shall be made for the prevention thereof, to be enforced as such preliminary orders are enforced respecting children.

Sec. No. 9465. Disposition of Property. Rule when wife obtains decree on ground of imprisonment or adultery of husband. Alimony pendente lite—Procedure—Orders.

No. 27. When the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be entitled to the same proportion of his lands and property as if he were dead; but in other cases the court may set apart such portion for her support, and the support of their children, as shall be deemed just

and equitable. In the event of the remarriage of the wife, and there being issue of the former marriage, the court in which the divorce was granted may, on proper showing for cause, enter an order that the alimony previously awarded, or part thereof, be paid as ordered by the court for the benefit of the minor children. In any suit for divorce now pending, or which may hereafter be commenced, the court or judge may, in its discretion, upon application, of which due notice shall have been given to the husband or his attorney, at any time after the filing of the complaint, require the husband to pay such sums as may be necessary to enable the wife to carry on or defend such suit, and for her support and for the support of the children of the parties during the pendency of such suit, and the court or judge may direct the application of specific property of the husband to such object, and may also direct the payment to the wife for such purpose of any sum or sums that may be due and owing the husband from any quarter, and may enforce all orders made in this behalf, as provided in section 24 of this act. As amended Stats 1915, 324.

Appendix D.

An Act relating to installment Judgments in divorce and separate maintenance actions. Approved March 17, 1949.

Section 9474.01 Installment Judgments not modified as to accrued installments.

Section 1. In divorce and separate maintenance actions installment Judgments for alimony and support shall not be subject to modification as to accrued installments, but only as to installments not accrued at the time a motion for modification is filed; provided, however, that the provisions of this act shall not preclude the parties from entering into a stipulation as to accrued installments prior to the time a motion for modification is filed.

(Repeal) Section 2. All acts and parts of acts insofar as they may be in conflict with the provisions of this Act are hereby repealed.